APPEAL NO. 021722
FILED AUGUST 14, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 4 and June 7, 2002. The hearing officer determined that the respondent/cross-appellant (claimant) sustained a compensable injury in the course and scope of his employment on _____, in the form of abrasions to the back and a contusion of the coccyx, and that the claimant did not have disability as a result of the injury. The appellant/cross-respondent (carrier) appeals the determination that the claimant sustained an injury in the course and scope of his employment, arguing that the claimant was not credible and there was no injury. The carrier also asserts that the findings that a fall occurred and that objective testing does not show the results expected from a traumatic injury are inconsistent. Finally, the carrier argues that the claimant quit work before the alleged injury occurred; therefore, any injury would not have been incurred in the course and scope of employment. The claimant, in response, urges affirmance of the injury determination, and points out testimony of the claimant that he did not resign, and that he continued to follow the employer's instructions concerning which doctor to go to, providing a urine sample for testing, and going to a meeting at the employer's office. In his cross-appeal, the claimant appeals the hearing officer's limitation of the compensable injury to abrasions to the back and a contusion of the coccyx, and the determination that there was no disability. The claimant attaches an MRI report to the cross-appeal, asserting that it is newly discovered evidence which warrants that the case be remanded for further consideration. The carrier has not responded to the cross-appeal.

DECISION

Affirmed in part; reversed and remanded in part.

As to the carrier's appeal of whether an injury occurred and whether it was in the course and scope of employment, these were factual matters for the hearing officer to decide. Conflicting evidence was presented on the disputed issues. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and it is for the hearing officer to resolve such conflicts and inconsistencies in the evidence as were present in this case (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate-reviewing body, we will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm the portion of the decision which finds that the claimant sustained a compensable injury in the course and scope of his employment.

The claimant attached to his appeal a medical record, a recent MRI, which was not in existence at the time of the CCH. Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that the case be remanded for further consideration, we consider whether it came to appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). There was evidence at the CCH that the claimant's treating doctor declined to see him anymore after the claim was disputed and the benefit review conference was decided unfavorably to the claimant. The claimant's appeal avers that the claimant was able to return to the treating doctor after the favorable CCH decision, and an MRI was ordered. The MRI was completed on July 12, 2002, with the results provided on July 15, 2002, and attached to the cross-appeal which was dated and mailed on July 16, 2002. The MRI report showed:

1. Central disc protrusion at the L5-S1 disc space with obliteration of epidural fat but without compression of thecal sac. The disc protrusion appears to impige [sic] on both S1 nerve roots.

2. Broad based central disc protrusion at L4-L5 disc space with slight impigement [sic] on L5 nerve roots on both sides.

3. Central spinal canal stenosis at L4-L5, L5-S1 level.

This evidence came to the claimant's attention after the CCH, it is not merely cumulative of other evidence, it was not because of a lack of due diligence by the claimant that it was not obtained earlier, and it has the potential of being so material that it would probably produce a different result to the claimant's appeal. Accordingly, we conclude that it is necessary to remand so that the hearing officer can consider this new evidence as it bears on the hearing officer's determination that there was no disability. On remand, the hearing officer must determine whether the claimant's activities in the course and scope of his employment were a cause of any of the medical conditions indicated in this new evidence, resulting in additional compensable injurious conditions. If there are any additional compensable injurious conditions, the hearing officer must determine whether the claimant's compensable injuries caused disability for him. This remand should not be construed, however, as a directive to change the decision but simply to reweigh the evidence in light of this new development. We leave to the discretion of the hearing officer whether consideration of this additional evidence will necessitate another hearing.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision

must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

C T CORPORATION SYSTEMS
350 NORTH ST. PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201.

_____
Michael B. McShane
Appeals Judge

CONCUR:

_____
Robert E. Lang
Appeals Panel
Manager/Judge

_____
Robert W. Potts
Appeals Judge